(1)

Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

The Supreme Court of the United States

John Barth,
Petitioner and Plaintiff
v.
United States,
Respondent and Defendant

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

Questions Presented for Review

1. Does the prevention or obstruction by the United States of the defense of private property against taking or damage by third parties, with full knowledge that such taking will occur as a result and could not otherwise occur, make the United States a principal in the taking of the property?
2. Does the claim against the United States, that a federal taking was effected by a district court judgment prohibiting the defense of private property against being taken, ask the Court of Federal Claims to examine the effect of the district court judgment itself, or does it improperly require review of the prior proceedings also, where the U.S. was not a defendant and federal taking was not an issue?
3. Is a federal taking, by obstructing the legal defense of private property against being taken, no more than failure to enforce rights, or is it denial of constitutional rights by the judicial branch, resulting in a federal taking of property?
4. Do the acts of the judicial branch of the government of the United States, declaring as res judicata all future acts of the Town of Sanford, Maine and its Inhabitants, and all such acts subsequent to final judgment in any prior related proceeding, which take or damage property interests of the plaintiff and the class to be joined, obstruct the legal defense of the property against such taking or damage?
5. Is the case before the lower court based upon a claim of constitutional right? Is just compensation for the taking of private property by the federal government authorized by Amendment V of the Constitution?

PARTIES

P1. Appellant Plaintiff John Barth is president of Springvale School ("School"), a Maine c[illegible]oration which since 1992 has been renovating the former upper campus of Nasson College in Springvale, to operate there a college preparatory school. The campus abuts the long-abandoned railbed. Springvale School will provide scholarships; jobs for the community; and sponsorship of thousands of orphans in the developing nations, using for such purposes the proceeds saved by renovation of the former college buildings. Barth is also an owner of land, and a resident, within the Impact Area.
P2. Appellee Defendant the United States is named as acting through the judicial branch thereof, as principal in the taking of property of Plaintiffs for public use by a third party, the town of Sanford, Maine.
NOTE: Where "plaintiff" is used this refers to plaintiff Barth; "plaintiffs" or "plaintiff class" refers to the prior plaintiff class, which may be joined if attorney representation is appropriate.

The Court is asked to recall that this action is the only means to save from ruined lives the thousands of orphans in developing nations which Springvale School shall support if its campus, rendered useless by erroneous judgments of the judicial branch, is replaced. These prior decisions of the judicial branch have not only subverted constitutional rights for which Americans have worked and fought for over 200 years, they have cast thousands of orphans upon the dumps and brothels of the third world. These prior judgments are grossly self-serving and unworthy, and if not reversed would embarrass the judicial branch in the final judgment of history.

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3. *Minnesota v. Mille Lacs Band of Chippewa* (97-1337, Sup.Ct. 1999) page 10
4. *Palm Beach Isles Associates v. U.S.* 99-5030 (Fed. Cir. 2001) page 10, 12, 13, 15
5. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) page 11, 13
6. *Shewfelt v. U.S.*, 104 F.3d 1333, 1337 (Fed. Cir. 1997) page 10
7. *Turney v. U.S.*, 115 F. Supp. 457 (Ct.Cl. 1953) page 10, 12
8. *YMCA v. U.S.* 395 U.S. 89 page 10

Statutes

28 USC § 2072 (rule making power) (appendix L)
42 USC § 1983 (Civil Rights Act) (appendix L)
28 USC § 1491 (Tucker Act, jurisdiction)

Other Authorities

The Constitution of the United States
Article III Sections 1, 2 (judicial branch) (p. 1)
Amendments V, XIV (pages 2, 10, 12, 17, 18)

Orders Entered

Date	Court, File No., Item	Appendix
8/12/03	U.S. Court of Appeals, Fed. Cir. 03-5063, Judgment	A
1/30/03	U.S. Court of Federal Claims 02-CV-1478, Order & Judgment	B
10/7/02	U.S. Supreme Court, Order	C
5/24/02	U.S. Court of Appeals, First Cir. 01-2756, Judgment	D
11/26/01	U.S. District Court, Maine 01-CV-208-PC, Order & Judgment	E
11/5/01	U.S. District Court, Maine, Mag.	F
12/15/00	U.S. District Court, Maine, Order 00-CV-286-PC (dismissal)	G

Jurisdiction

The judgment brought for review was dated 8/12/03; this petition is brought within 90 days of the date of judgment, in accordance with RSC Rule 13.1 and other provisions of the Rules of the Supreme Court.

Jurisdiction of the United States Supreme Court is conferred by Article III sections 1,2 of the Constitution of the United States; 28 USC §2106 confers jurisdiction to modify or reverse any judgment, decree, or order of court lawfully brought for review; 28 USC § 1254(1) provides for review by this Court of cases in the U.S. courts of appeals by writ of certiorari, under which jurisdiction is invoked in this case.

Provisions of the United States Constitution

Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Statement of the Case with Pertinent Facts

This action arises from acts of the judicial branch of the government of the United States knowingly preventing the defense of property against taking by third parties, the town of Sanford and its inhabitants, and in so doing acting directly as principal in the taking. This petition must be candid: these judgments were self-serving and unworthy.

The original defendants have caused, intensified and extended a nuisance, the use of extremely noisy hobby vehicles (ATVs, motorcycles, and snowmobiles) upon an abandoned railbed of town in a residential area, which prevents enjoyment of residences and prevents academic use of the campus of Springvale School now under renovation. Springvale School will sponsor orphans in the developing nations, and was founded by Plaintiff. Efforts by plaintiffs and others to seek redress by petitions, polls, administrative and political means have been opposed by those defendants by means of harassment, threatening, massive vandalism, arson, assault, tampering with public records, and perjury against the plaintiff-appellant and the plaintiff class to be joined, to obstruct justice and deny their constitutional rights. The prior defendants have so damaged Springvale School with their crimes, and have so abused and threatened to abuse municipal power to prevent its opening and operation, that the school must be relocated beyond any influence of the town.

This matter has never been heard in court despite several related actions at state and federal level. A prior series of actions in state and federal court led to dismissal on false pretenses of res judicata by the District Court for Maine which was appealed to the Supreme Court. Only the judgment in that action is the subject of the present action, in which the defendant is the United States, for taking of property by denial of its defense against being taken by third parties, the original defendants.

Prior actions RE-99-024 and CV-99-067 in York county superior court of Maine were concise but complex pleadings of 70 pages dismissed with an impossible order to abbreviate them by 80 percent (App. J, K) *by a judge having personal and financial ties with the defendants*, who refused to recuse himself. The conciseness rules of procedure were in no way violated by plaintiffs: the length of pleadings was due entirely to the number of claims, facts, and arguments essential to a complex case. Plaintiffs made over 200 hours of efforts to abbreviate and explain, and on 12/1/99 filed CV-99-265, which was dismissed "with prejudice" 3/30/00 (App. I) with the absurd claim of excessive document length. This was an act of misconduct as shown by the pleadings. Any comparison with other major civil actions shows this to be a deliberate and outrageous abuse by the county court.

The dismissal was appealed to the Maine Law Court as YOR-00-188, where it was denied review 10/2/00 (App. H) as discretionary. This unconstitutional state denial of due process in defense of constitutional rights brought the matter to federal court.

Action 00-286-PC was filed 10/10/00 in U.S. District Court for Maine. The class representative twice asked for federal protection from ongoing destruction of his residence, office and charity school by massive gang vandalism solicited and protected by defendant town. Although the complaint stated many clear violations of federal constitutional rights, the action was dismissed for "failure to state a federal issue" (App. G), a cynical and outrageous abdication of duty, and a deliberate attack upon the constitutional rights of the people of the United States. Action 01-CV-208-PC was filed 8/21/01, itemizing the constitutional rights violations with counts headings. It was dismissed by the same judge 11/26/01 (App. E) accepting the recommendations (App. F) of a corrupt district magistrate who is also an advisory member of the court of appeals in the present action, which consisted of perjured statements of fact and deliberately false argument,

distorting every point of law in a disgraceful effort to sweep away this clearly legitimate complaint against a municipality. The magistrate simply lied that the claims of continuing violations were all res judicata, although *none* of the claims met *any* of the three established criteria: identical parties (prior defendant was distinct by its admissions), identical claims (continuing tort claims are distinct facts), and prior final judgment on the merits (no prior claim was answered, argued, or mentioned in any prior judgment). In relying upon such worthless and faked argument, the judgment contradicted the law and the facts on every point.

Subsequent investigation of the district magistrate showed numerous large financial transactions over a period exceeding ten years involving his wife and often lawyers of firms practicing before the district court for Maine. However the public record alone could not prove corruption.

Appeal 01-2756 was filed 12/17/01 in the federal court of appeals for the First Circuit; presenting 30 gross errors of law in the district court judgment for review. The judgment of 5/24/02 (App. D) merely affirmed the district court judgment without argument, refusing to consider any of the issues presented. The absence of plausible argument in these decisions spoke volumes about the disregard of these courts for constitutional rights.

Also in the prior action, petition for certiorari 02-28 was filed 7/5/02 in the U.S. Supreme Court; presenting for review 12 major sets of errors of law in the district court judgment. In its denial of certiorari without argument 10/7/02 (App. C), the court failed to correct these serious abuses.

The intent and the effect of the district court decision is to prohibit the defense of the constitutional rights of the plaintiff and others against continuing violation, which is deliberate subversion of constitutional rights by the judicial branch. The record of the prior case clearly shows the abdication of duty of the lower courts to defend the constitutional rights of citizens, in favor of unconstitutional

doctrines of judicial economy, political prejudice, and efforts to whitewash unconstitutional acts of the judicial branch itself. Having appealed these doctrines to the U.S. Supreme Court without redress, the Plaintiffs established in the prior action that the judicial branch of the United States abandoned the role of neutral bystander to become a principal in these continuing violations, without whose acts of restraining and prohibiting the defense of property against being taken, no such violation of constitutional rights could continue.

The present action 02-CV-1478 was filed 10/30/02 in the Court of Federal Claims establishing that the United States acting through the judicial branch had by these earlier decisions prohibited the defense of private property against being taken for public use without just compensation, and had thereby effected a regulatory taking by the United States. The prior claims and proceedings are not the subject of this action: only the unconstitutional effect of prior judgments.

The dismissal order of the Court of Federal Claims (App. B) deliberately mischaracterized both the course of prior proceedings and the basis of the claim. *It states falsely* that the Town of Sanford has "failed to restrict" the subject nuisance, when in fact the town has extensively promoted the nuisance on its own property, and has attacked complainants with gang vandalism, arson, assault, slander, and perjury. *It states falsely* that prior state actions were dismissed for failure to follow the rules of the court, when in fact no rule was ever violated by the Plaintiffs despite numerous violations of rules and in fact numerous well documented felonies by the corrupt officials and inhabitants of the defendant town. *It states falsely* that the federal action dismissed as res judicata "alleged a virtually identical injury" as prior state action, when in fact this was continuing tort action (distinct instances of claim), the parties were legally distinct by admission of the defendant, and no prior related judgment had reached the merits of the claims: the established criteria of res judicata. *It states falsely* that the United States

can have no responsibility for third party takings which it has protected, in contradiction to prior decisions of this Supreme Court and the court of appeals for the Federal Circuit. *It states falsely* that the complaint asks the court to review prior proceedings. *It states falsely* that the complaint is based upon failure to enforce rather than obstruction of defense. These self-serving falsehoods are intended to subvert the constitutional rights of citizens and to whitewash regulatory taking of property by the judicial branch itself.

Appeal 03-5063 was filed 2/14/03 in the federal Court of Appeals for the Federal Circuit. The order of that court (App. A) again brazenly misrepresented the complaint, claiming (p. 3) in direct contradiction of the entire course and substance of the complaint and the appeal, and without any basis in fact, nor any argument whatsoever, that "appellant asked the Court of Federal Claims to scrutinize the actions of coordinate federal courts." Even a quick perusal of the Complaint or the Brief of Appellant shows that the court's statement is deliberately and diametrically opposed to the facts. Of course the court was unable to produce any argument that it would have to look past the prior judgments and review proceedings which share no claim or defendant with the present case, to determine the effects of the prior judgments themselves. Again the federal court lied to cover up unconstitutional acts by the judicial branch.

This kind of deliberate misrepresentation to rationalize a self-serving decision is exactly the kind of act by which the judicial branch has made the United States a principal in the violation of rights guaranteed by its Constitution. There is no cause to pull punches here; these lower court judgments are self-serving and unworthy, and if not reversed would be an embarrassment to the judicial branch in the final judgment of history.

Argument for Certiorari

This petition presents several questions involving constitutional rights claims against the federal government arising from acts of the judicial branch. As no findings of fact have been made in this matter, these are not the basis of this petition.

Questions 1 through 5 deal with the issue of regulatory taking of private property by the judicial branch of the federal government. These questions merit certiorari due to conflict of the judgment under review with prior decisions of this Court per Rule 10(c.), and with decisions of the U.S. courts of appeals per rule 10(a) and 10(b). The fundamental Questions 1 through 3 have apparently not been decided by this Court, and should be so decided per rule 10(c.).

Question 2 has been incorrectly decided by the court of appeals so as to circumvent prior decisions of the Supreme Court. The guidance of the Supreme Court is also needed in the remaining questions.

Question 1

Does the prevention or obstruction by the United States of the defense of private property against taking or damage by third parties, with full knowledge that such taking will occur as a result and could not otherwise occur, make the United States a principal in the taking of the property?

Inevitably the denial of defense against continuing tort taking property interests must result in such a taking.

Like the guard of an armored truck who prevents his fellow guard from defending, where the judicial branch has knowingly and explicitly used its power to obstruct the defense of private property against taking or damage by third parties, it has made itself a principal in the damage. The

judicial branch cannot claim to have been an neutral bystander, even if it cannot be held to its duty as a guard. Where it merely fails to defend, it might evade liability under a self-serving interpretation of sovereign immunity. But in prohibiting defense it turns its weapon upon the people of the United States. It is not merely an accessory, because without its knowledge and its act the damage could not have been done. The fact that normal judicial actions of the judicial branch do not obligate it for losses caused by others does not exempt it from liability for losses deliberately caused by itself.

The *Brief of Appellant* before the court of appeals shows by means of many historical examples from colonial times to the most recent international crises, that where individuals, private entities, states of the United States, and foreign powers obstruct the military, private, *or legal* defense of property of the United States or its citizens against taking or damage by third parties or natural processes, *the entity which denies the defense of property is and has always been held responsible* by the United States for the third party taking of property.

In one early example, in 1864 twenty sympathizers of the Confederacy disguised as sportsmen robbed banks in St. Alban's, Vermont of $200,000 and fled to Canada. Fifteen were caught by a U.S. posse and turned over to authorities in Montreal, where a Canadian magistrate discharged them. The United States ordered U.S. troops to pursue and destroy future raiders from Canada, until Canada reproved the magistrate, and recaptured and prosecuted five of the raiders. Here the legal defense of U.S. private property against taking by third parties was obstructed by a magistrate, and the United States held responsible the sovereign power having judicial authority.

In recent years, the complicity of foreign governments in property damage by third parties has become a primary concern in US foreign policy. Both Afghanistan and Iraq have

been held responsible for obstructing the defense of property against acts of third parties whom they have protected.

When *its own property* is taken by third parties under judicial protection of a sovereign power or a state of the union, the United States has throughout its history to the present day held the sovereign power or state responsible. The judicial branch has also held the executive branch of the U.S. government responsible for such regulatory takings [1,4,7]. But now where the judicial branch itself has taken property in the same manner, the lower courts have pretended that its own wrongdoing cannot be judged. To establish a double standard, by which the United States judicial branch alone could with impunity permit third parties to take the property of its citizens, would be a travesty of judicial process.

The United States is responsible for taking or damage of private property of its citizens in the same manner as an individual, and is explicitly required to make just compensation by Amendment V of the Constitution of the United States. The Constitution does not contemplate circumvention by federal protection of third party taking of property, or by federal obstruction of the defense of property against being taken by third parties.

To establish taking by the U.S. acting through a third party, the Supreme Court has required showing that the taking or damage occurred as a result of "direct and substantial" involvement of the U.S. in the third party acts [7]. Where classified military equipment accidentally given to the Philippines and sold was recovered with participation of the U.S. military, compensation was due from the United States. Where the U.S. was not involved it was not liable [2,3,6,8], but obstruction of defense is direct involvement.

The act of a sovereign power or state of the union or its agents or magistrates in obstructing the legal defense of property against damage by a third party is clearly "direct and substantial involvement" in the damage. The United States

has in effect found "direct and substantial involvement" of foreign powers in all of the cited historical and recent cases of obstruction by magistrates of the legal defense of U.S. property. Denial of defense is the fundamental criterion of taking by force, which when permanent includes solicitation, facilitation, and ratification, all of the possible criteria for a finding of principal in forcible taking of property.

The United States has also accepted reciprocal responsibilities under treaties and arbitration, that obstruction of the military, private, or legal defense of foreign property against taking or damage by third parties or natural processes operates as direct and substantial involvement of the United States therein [see treaty citations in *Brief of Appellant*].

Where the United States itself acts directly to prevent the defense of specific property from continuing damage by a third party, it acts in substantial collusion with the third party in causing the damage; it also solicits, facilitates, and ratifies the damage to property as principal. By all of these means it has "direct and substantial involvement" in the taking of property, and is liable for just compensation. Any argument that the federal government may deny responsibility for explicit impairment of the legal defense of property of its own citizens against being taken by third parties is without merit or precedent, an attack upon the constitutional rights of citizens.

The decision of the court of appeals seeks to circumvent prior decisions of this Supreme Court including *Penn Cent. Transp. Co. v. New York City* [5], by creating false threshold issues of jurisdiction and immunity to preclude such cases against the U.S. itself. The denial of legal defense squarely meets the criteria of regulatory taking established by the Supreme Court in Penn Cent. Transp. [5], which are (1) denial of an economically viable use of the property; (2) investment-backed expectation of the denied use (likelihood that property would be used in the manner denied, which is more properly a determinant of the value to be compensated);

and (3) the right balance between private rights and government need (more properly a criterion of eminent domain taking rather than whether a taking has occurred). The residentially-zoned property of the Plaintiff and similarly situated persons to be joined clearly meets these criteria. Although the third criterion is not material to the fact of taking, the right to residential use of residentially-zoned land clearly outweighs any government need involved (hobby vehicle operation in a residential area, in the case of the town of Sanford; judicial economy in the case of the United States).

The decision of the court of appeals also contradicts its own prior decisions in *Boise Cascade Corp. v. U.S.* [1], *Palm Beach Isles Associates v. U.S.*[4], and *Turney v. U.S.* [7]. In these cases the U.S. was held responsible for property taking despite the same threshold circumstances present here. The difference is that in those cases the taking was by the executive branch.

This question is fundamental to the proper adjudication of Amendment V claims involving property takings, because any federal taking may be effected by third party. Without guidance of the Court this constitutional right is without adequate protection. The question has not been decided by the Supreme Court and should be so decided.

Question 2

Does the claim against the United States, that a federal taking was effected by a district court judgment prohibiting the defense of private property against being taken, ask the Court of Federal Claims to examine the effect of the district court judgment itself, or does it improperly require review of the prior proceedings also, although the U.S. was not then a defendant and federal taking was not an

issue? This question has not been decided by the Supreme Court, and should be so decided.

The lower court raised this false jurisdictional issue to circumvent the decision of the Supreme Court in *Penn Cent Transp. Co. v. New York City* [5]. For explanatory purposes, the complaint before the Court of Federal Claims summarizes prior errors of the district court for Maine and the court of appeals for the First Circuit in allowing the gross legal and factual falsehoods of a prejudiced magistrate to stand without review. But this complaint does not seek review of prior proceedings or findings, and explicitly says so in many places.

The lower court is asked only to admit that the *effect* of the prior judgments prohibiting defense constitutes taking the property interests of the plaintiff and others without just compensation. This residual constitutional basis of claim is independent of the prior proceedings because these are continuing violations causing continuing taking *and* the prior action did not involve the issue of federal taking. Action upon the residual constitutional claim does not require the lower court to review the merits of the district court decision which involves only unrelated claims and unrelated defendants.

The claim is not based on the question of whether substantive provisions of law have been correctly applied in district court. As in *Boise Cascade Corp. v. U.S.* [1] and *Palm Beach Isles Associates v. U.S.* [4], whether or not that decision was correct, the Plaintiff's and others' constitutional right against taking of their property for public use remains indisputably and deliberately in violation from day to day, and cannot constitutionally be dissolved by any court, nor alienated by any act of the Plaintiffs. The resulting violations of constitutional rights may readily be judged without reference to the proceedings of other courts.

The defendant appellee nowhere argued, and Appellant cannot imagine, why the Court of Federal Claims would *have* to review the findings of other courts on the res judicata issue, to decide whether the U.S. has in obstructing

the defense of constitutional rights made itself a principal in the taking of property. The question is not *how* process was denied (district court proceeding), or whether it was denied in accordance with accepted judicial *doctrine* (first circuit and supreme court proceedings), but whether that denial has the unconstitutional *effect* charged, an entirely different question. There is in fact no connection at all between the issue before the Court of Federal Claims and that presented to other courts in prior action.

The court of appeals was unable to offer any reason whatsoever that it would have to examine prior proceedings to see the effect of the prior judgment. Of course there *have been* cases where the Court of Federal Claims would have had to review the proceedings of another court. But the appeals court could not argue that for *this* case. Of course one would be *curious* to know how those proceedings led to a clearly unconstitutional effect (it resulted from malicious application of a constitutionally infirm doctrine of res judicata), but the *effect* of the prior judgment was not an issue in those proceedings, and is not apparent from nor related to them.

In exactly zero of the numerous historical cases cited in the *Complaint* and the *Brief of Appellant*, in which the U.S. has held sovereign powers and states of the union and the executive branch of the U.S. government responsible for the taking of property by third parties, did the judicial branch find it necessary to examine prior proceedings of defendants to decide whether their acts effected a taking of property. It is unnecessary to do so for the judicial branch.

The judicial branch cannot be presumed unique among government branches in having no capacity for taking private property, whether by accident, impropriety, or in pursuit of administrative efficiency, despite its great power. Inevitably the denial of due process against continuing tort taking property interests must result in such a taking. If the decision of the court of appeals on this question were allowed

to stand, the judicial branch would nullify the constitutional rights of citizens to due process in defense of private property, because it could be denied with impunity by government on any pretext. This question has not been decided by the Supreme Court, and should be so decided.

The decision also directly contradicts prior decisions of the court of appeals for the Federal Circuit itself, including *Boise Cascade Corp. v. U.S.* [1] and *Palm Beach Isles Associates v. U.S.* [4], wherein the U.S. government was held to have effected a regulatory taking by denial of land use, and that no review of prior proceedings involving only the land use was necessary to decide the fact of federal taking.

Question 3

Is a federal taking, by obstructing the legal defense of private property against being taken, no more than failure to enforce rights, or is it denial of constitutional rights by the judicial branch, resulting in a federal taking of property?

There is no claim of failure to enforce nor any related claim in the complaint, nor is any argument thereof based upon any failure to enforce. Plaintiff is not required to make the claim of failure to enforce simply because that also occurred. The district court *not only* failed selectively and deliberately in its duty to enforce, but it also prohibited the future defense of constitutional rights, and it is this latter act which makes it the principal in their violation, and upon which this case is based. Had it merely failed to enforce, it might have evaded liability under the fallacious and self-serving doctrine of sovereign immunity. But in prohibiting the defense of constitutional rights the judicial branch turned its weapon upon the people of the United States, and caused property to be taken unconstitutionally.

In exactly zero of the numerous historical cases cited in the *Complaint* and the *Brief of Appellant*, in which the U.S. has held sovereign powers and states of the union and

the executive branch of the U.S. government responsible for the taking of property by third parties, was immunity granted for failure to enforce. The judicial branch is also not immune.

This question has not been decided by the Supreme Court and should be so decided.

Question 4

Do the acts of the judicial branch of the government of the United States, declaring as res judicata all future acts of the Town of Sanford, Maine and its Inhabitants, and all such acts subsequent to final judgment in any prior related proceeding, which take or damage property interests of the plaintiff and the class to be joined, obstruct the legal defense of their property against such taking or damage?

This question links the case to the essential issues. Again it is obviously true. The declaring by the judicial branch of any future defense of property interests against any takings subsequent to final judgment in any prior related proceeding, to be res judicata, by definition prohibits the defense thereof against such property takings in the future, directly nullifying constitutional rights. Guidance of this Court is needed to ensure that its decisions are correctly applied.

The decision of the district court for Maine that the Plaintiffs' continuing claims against the town of Sanford were res judicata although distinct in kind or instance from prior state action, although the defendants were distinct, and although there was no final decision on the merits of any claims in prior state action, appears to have been seriously flawed in every point of law and was appealed on this basis, affording the judicial branch ample notice and opportunity to correct error. With full knowledge that these acts of the judicial branch would solicit, facilitate and ratify takings of private property, the First Circuit court of appeals affirmed the decision without argument. The question whether or not

the judicial branch decisions were correct in the sense of accordance with its *own doctrines* is no longer at issue, but those decisions intentionally prevented the Plaintiffs' future defense of their constitutional right against taking of their property. That right cannot be dissolved by any act of court, nor alienated by any act of the Plaintiffs, but is now violated as the result of those acts of the United States.

Without those acts of the judicial branch, the Plaintiffs could have defended their federal constitutional rights in property, and could continue to defend those rights against these continuing violations. By these acts the judicial branch abandoned the role of neutral judicial bystander, in the same manner as the guard who assists in robbery assumes the role of principal in the robbery. By this "direct and substantial involvement" the judicial branch itself denied the constitutional rights of the Plaintiffs to due process in the defense of their constitutional rights in property, and has made itself the principal in the denial of the Plaintiffs' Amendment V right to compensation for the taking of their property for public use. The violations are now acts of the judicial branch, a regulatory taking of private property, and this cause of action now lies against the United States.

There is no legalistic wordplay or judicial doctrine which can nullify the rights clearly set forth in the Constitution, and any attempt at this is subversion of the government. Amendment V obviously does not permit government evasion by authorizing third parties to take property. The founders of the nation would have been aghast to hear of interference such as this by the judicial branch with the defense of constitutional rights so clearly and unequivocally established in our supreme law. Clearly these acts of the United States obstruct the defense of property against taking or damage by third party.

The guidance of the Court is needed to ensure that its decisions on the related questions are correctly applied.

Question 5

Is the case before the lower court based upon a claim of constitutional right? Is just compensation for taking of private property by the federal government authorized by Amendment V of the United States Constitution?

The Court of Federal Claims order paradoxically denies these facts, although clear in the Complaint. The case is based upon violation of Amendment V of the Constitution of the United States, the supreme law of the land, which specifically requires the United States to make just compensation for taking of private property. Finding on this point will prevent unnecessary process should this further pretext for dismissal be used.

For Petitioner and Plaintiff Class:

_____

John S. Barth, pro se,
Petitioner and Plaintiff Class Representative
Dated this _____ day of September, 2003

Appendix A: Judgment of Court of Appeals, Fed. Cir.

United States Court of Appeals for the Federal Circuit

03-5063

JOHN BARTH,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: August 12, 2003

Before MICHEL, BRYSON, and DYK, Circuit Judges.

PER CURIAM.

John Barth ("appellant") appeals the Court of Federal Claims' dismissal of his complaint for lack of jurisdiction. Barth v. United States, No.02-1478L (Ct. Cl. Jan. 30, 2003). We affirm.

BACKGROUND

The appellant filed suit in Maine Superior Court alleging that the town of Sanford, Maine, had failed to restrict the use of certain recreational vehicles near his property, which thereby created a nuisance. The complaint asserted that this constituted a taking of his property. His suit was ultimately dismissed with prejudice, a decision upheld by the Maine Supreme Judicial Court. Barth v. Town of Sanford, No. Yor-00-188, Decision No. Mem. 00-111 (Oct. 2, 2000).

The appellant then filed suit in the United States District Court for the District of Maine, which found that he

was alleging a virtually identical injury and thus dismissed because his suit was barred by res judicata. Barth v. Town of Sanford, No. 01-CV-208-P-C (D. Me. Nov. 26, 2001). The First Circuit affirmed, Barth v. Town of Sanford, No. 01-2756 (1st Cir. May 24, 2002), and the Supreme Court denied certiorari, Barth v. Town of Sanford, 123 S. Ct. 80 (2002).

On October 30, 2002, the appellant filed a complaint in the Court of Federal Claims. He alleged that the federal judiciary's failure to force Sanford, Maine, to abate the alleged nuisance caused by "the use of extremely noisy hobby vehicles (ATVs, motorcycles, and snowmobiles...)" near his property(1) constituted a continuing taking of his property without just compensation in violation of the Fifth Amendment. (Compl. at 2). The government moved to dismiss the appellant's complaint, which the Court of Federal Claims did on January 30, 2003. Barth, No. 02-1478L, slip op. at 3. The appellant timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

The appellant alleges that the United States District Court for the District of Maine, the United States Court of Appeals for the First Circuit, and the United States Supreme Court effected a taking of his property, requiring compensation under the Fifth Amendment, by failing to

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(1) The appellant alleged that he was "president of Springvale School," which "abuts" the alleged nuisance area, that he was "also an owner of land, and a resident, within" the alleged nuisance area, and that "the residents and landowners of the village of Springvale in the town of Sanford who reside within seven hundred feet" of the alleged nuisance area "may be joined to convert this action into a class action[.]" (Compl. at 3.)

require Sanford, Maine, to abate an alleged nuisance. Court of Federal Claims correctly determined that it did not have jurisdiction to adjudicate the appellant's suit. We held in Allusiarte v. United States, 256 F .3d 1349 (Fed. Cir. 2001), denied, 534 U.S. 1042 (2001), that the Court of Federal Claims lacked jurisdiction to determine whether the actions of a bankruptcy court constituted a taking because "[s]uch a determination would require the court to scrutinize the actions of the bankruptcy trustees and courts." at 1351-52; Boise Cascade Corp. v. United States, 296 F.3d 1339, 1344 (Fed. Cir. 2002), denied, 123 S. Ct. 1484 (2003) (Court of Federal Claims had jurisdiction over takings claim because it "did not require the Court of Federal Claims to review the merits of the district court's order" but rather only to determine "whether the [government's] assertion of jurisdiction over [the plaintiffs property] by seeking and obtaining the injunction worked a taking of its property that requires compensation under the Takings Clause."); Vereda, Ltda. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (Court of Federal Claims lacked jurisdiction over suit to determine whether administrative forfeiture under 21 U.S.C. § 881 constituted taking because the suit would "requir[e] a determination of the correctness of the administrative forfeiture."). The proper forum for such scrutiny, we held, was not the Court of Federal Claims but the Ninth Circuit. Allusiarte, 256 F .3d at 1352. The same result follows in this case. The appellant asked the Court of Federal Claims to scrutinize the actions of coordinate federal courts to determine whether their actions effected a taking of his property. That was beyond the Court of Federal Claims' jurisdiction.(2)

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(2) The government urges that the appellant lacks standing to pursue this claim because he does not own the property in question. Since the appellant fails to state a claim upon which relief can be granted, a threshold jurisdictional

issue, we need not reach the issue of standing. ~ Myers Investigative Sec. Servs.. Inc. v. United States, 275 F .3d 1366, 1369 (Fed. Cir. 2002) (holding that because the plaintiff lacked standing, a threshold issue, the court need not reach issue of whether case was also moot).

COSTS

No costs.

Appendix B: Judgment and Order of U.S. Court of Federal Claims

In the United States Court of Federal Claims

No.02-1478 L

FILED JAN 30, 2003

JOHN BARTH,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Order Directing Dismissal of Complaint, filed January 30, 2003,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Margaret M. Earnest ,
Clerk of Court

January 30, 2003

By: (signature)
Deputy Clerk

In the United States Court of Federal Claims

No.02-1478L
Filed: January 30, 2003

JOHN BARTH)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)

ORDER
DIRECTING DISMISSAL OF COMPLAINT

I.

In this action, plaintiff, John Barth, appearing pro se, seeks compensation from the United States for the alleged taking of private property for public use without just compensation. Defendant has moved to dismiss plaintiff s complaint for failure to state a claim upon which relief can be granted. For the reasons set forth below, defendant's motion is granted.

II.

Plaintiff has filed five separate lawsuits before the Maine Superior Court, each one alleging that the town of Sanford, Maine, had failed to restrict the use of certain recreational vehicles on or near the Springvale School

campus, thereby causing a nuisance and thus constituting a taking of private property in violation of the Fifth Amendment to the United States Constitution. All but one of these suits were dismissed either upon plaintiff's own volition or without prejudice for plaintiff's failure to comply with the rules of the court. The exception, Barth v. Town of Sanford, No. CV -99-265 (Mar. 30, 2000), was dismissed by the Maine Superior Court (York County) with prejudice and that holding was later upheld on appeal by the Maine Supreme Judicial Court, Barth v. Town of Sanford, No. Yor-00-188, Decision No. Mem. 00-111 (Oct. 2,2000).

Thereafter, plaintiff filed suit in the United States District Court for the District ofMaine alleging a virtually identical injury .Barth v. Town of Sanford, No. 01-CV-208-P-C (D. Me. Nov. 26, 2001). The district court dismissed plaintiff's complaint on the ground that a dismissal with prejudice before the state court constituted a judgment on the merits, and, thus, plaintiff's claim was barred by the doctrine of res judicata. The United States Court of Appeals for the First Circuit affirmed that conclusion, Barth v. Town of Sanford, N 0. 01- 2756 (1st Cir. May 24, 2002), and the Supreme Court denied certiorari, Barth v. Town of Sanford, No.02-28 (S. Ct. Oct. 7, 2002).

Plaintiff has now restyled his complaint and sues here under the theory that his failure to obtain constitutional relief from the federal courts gives rise to an action against the United States. In effect, however, plaintiff's claim is a challenge to the legitimacy of the decisions of both the state and federal courts. Such an attack is not properly before this court. As stated in MGA. Inc. v. General Motors Corn., 827 F.2d 729, 732 (Fed. Cir.1987), cert. denied, 484 U.S. 1009 (1988), plaintiff's "avenue to redress any legal errors committed in these decisions was to appeal, as it did, to each available level in the [state] court system. It is inappropriate

to collaterally attack the [state] judgment in federal district court in an attempt to avoid, defeat or evade the judgment thus denying it force and effect."

Even if the state and federal courts' judgments could be construed as an unlawful failure to enforce plaintiff's legitimate property rights, however, it is nonetheless the town of Sanford, Maine, and not the United States, that effectuated the claimed taking. Plaintiff thus has no Fifth Amendment cause of action against the federal government for the taking of his property.

Nor can plaintiff find relief in this court under the due process and equal protection clauses of the Fourteenth Amendment. This court's jurisdictional grant, set forth at 28 U.S.C. § 1491(a)(1) (2000), requires that plaintiff's claim, whether arising from the Constitution, a statute, or a regulation, be based on a provision that mandates the payment of money by the United States. United States v. Testan, 424 U.S. 392,398 (1976). The Fourteenth Amendment is not a money-mandating statute. LeBlanc v. United States, 50 F.3d 1025, 1028 (Fed. Cir .1995). Accordingly, the relief plaintiff seeks is unavailable in this court and this court is without jurisdiction to hear plaintiff s claim.

III.

For the reasons set forth above, defendant's motion to dismiss is granted. The Clerk is directed to dismiss plaintiff's complaint.

John P. Wiese

Judge

Appendix C: Order of U.S. Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543
October 7, 2002

Mr. John S. Barth
P.0. Box 88
Springvale, ME 04083

Re: John Barth
v. Town of Sanford, et al.
No.02-28

Dear Mr. Barth:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter, Clerk

Appendix D: Judgment of U.S. Court of Appeals

United States Court of Appeals
For the First Circuit

No.01-2756

JOHN BARTH,
Plaintiff, Appellant

v.

SANFORD, TOWN OF; WILLIAM ROBERTS, in his individual capacity; RICHARD WILKINS, in his individual capacity; SELECTMEN OF SANFORD,
Defendants, Appellees.

Before
Boudin, Chief Judge,
Stahl, Senior Circuit Judge,
and Lynch, Circuit Judge.

JUDGMENT
Entered: May 24, 2002

Plaintiff John Barth appeals from the denial of his request for class certification and from the dismissal of his federal complaint on the basis of res judicata. Having carefully reviewed the record, we find the analysis offered by the magistrate judge, and adopted by the district court, cogently premised and legally sound. Affirmed.

So ordered.

By the Court:
Richard Cushing Donovan, Clerk
By: Janice M. O'Neil
Chief Deputy Clerk

Appendix E: Judgment & Order of U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH,	)	
	)	
v.	)	Civil No. 01-208-P-C
	)	
TOWN OF SANFORD AND ITS INHABITANTS; SELECTMEN OF SANFORD; WILLIAM ROBERTS AND RICHARD WILKINS	)	

JUDGMENT

The defendant's Motion to Dismiss having been granted by the Court on November 26, 2001, judgment is hereby entered for the defendants, Town of Sanford and its Inhabitants; Selectmen of Sanford; William Roberts and Richard Wilkins, against the plaintiff, John Barth, and the complaint is hereby DISMISSED.

WILLIAM S. BROWNELL
CLERK
By: s/Michelle Levasseur,
Michelle Levasseur,
Deputy Clerk

Dated at Portland, Maine, this 26th day of November, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff	
v.	Civil No. 01-208-P-C
TOWN OF SANFORD, et al, defendants	

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the Court November 5, 2001, with copies to the pro se Plaintiff and to counsel, his Recommended Decision herein (Docket No. 12). Plaintiff filed his objection thereto on November 13, 2001 (Docket No. 13), and defendants waived their right to respond to Plaintiff's objection on November 21, 2001 (Docket No. 17). This Court having reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record and having made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision, and concurring with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision, and having determined that no further proceeding is necessary; it is ORDERED as follows:

(1) The objection of the Plaintiff is hereby DENIED;
(2) The Recommended Decision of The Magistrate Judge is hereby AFFIRMED;
(3) Plaintiff's motion for certification of a class is hereby DENIED;

(4) Defendant's motion to dismiss this action is hereby GRANTED.

s/ Gene Carter
GENE CARTER
District Judge

Dated at Portland, MAINE this 26th day of November, 2001

Appendix F: Magistrate Decision, U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff	
v.	Civil No. 01-208-P-C
TOWN OF SANFORD, et al, defendants	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND DEFENDANTS' MOTION TO DISMISS

The defendants, the town of Sanford, its inhabitants, its selectmen and two individuals, William Roberts and Richard Wilkins, move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6). Also pending is the pro se plaintiff's motion to certify a plaintiff class. I recommend that the court deny the motion to certify and grant the motion to dismiss.(1)

I. Class Certification

> The plaintiff seeks certification of the following class: the residents and landowners of the village of Springvale in the town of Sanford who reside within seven hundred feet of the former railbed there... and are injured in the use and enjoyment of their property by acts of defendant [sic] in maintaining, promoting, extending and refusing to abate a noise nuisance there.

(1) The plaintiff contends that the motion to dismiss is untimely. Plaintiff Class Opposition to Defendant Motion to Dismiss ("Opposition") (Docket No. 5) at 20. While ordinarily the 20 days allowed for a responsive pleading after

service of the complaint on the town clerk, see Return of Service, Exh. A to Opposition, would have expired on September 11, 2001, the filing of the motion to dismiss on September 12, 2001 (Docket No. 4) was not untimely because the clerk of this court extended deadlines for all litigants that fell on September 11, 2001 for one day due to the tragic national events of that day.

Complaint (Docket No. 1) paragraph P1. Class actions are governed by Fed. R. Civ. P. 23. It is not necessary to address the requirements of that rule under the circumstances present here, however. The plaintiff appears pro se and seeks to represent the proposed class. Plaintiff Motion for Order of determination of Class Action under Rule 23(c.)(1) (Docket No. 7) at 1. In general, class representatives cannot appear pro se. 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 1769.1 at 380 (2d ed. 1986).

> A litigant may bring his own claims to federal court without counsel, but not the claims of others. This is so because the competence of a layman is "clearly too limited to allow him to risk the rights of others."

Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000) (citations omitted), quoting *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975). See also *Avery v. Powell*, 695 F.Supp. 632, 643 (D. NH 1988). Given the nature of the claims set forth in the complaint and the sweeping scope of the relief sought, the plaintiff cannot serve as an adequate representative of the proposed class. Accordingly, his request for class certification should be denied.

II. Motion to Dismiss

A. Applicable Legal Standard

The defendants' motion invokes Fed. R. Civ. P. 12(b)(6). Defendants' Motion to Dismiss, etc ("Motion to

Dismiss") (Docket No. 4) at 1. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty the the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v Russo*, 96 F.3d 566, 569 (1st Cir. 1996); see also *Tobin v. University of Maine Sys.*, 59 F.Supp..2d 87, 89 (D.Me. 1999).

B. Discussion

The defendants contend that this action is barred by the operation of the legal doctrine of res judicata. Referring the court to an action filed by the plaintiff in state court entitled *John S. Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265. Motion to Dismiss at 4-5. That action was dismissed with prejudice, Order [dated March 30, 2000], *Barth v. Town of Sanford*, Maine Superior Court (York County), Docket No. CV-99-265, and the dismissal was upheld on appeal, *Barth v. Town of Sanford*, Decision No. Mem 00-111, Docket No. Yor-00-188, Maine Supreme Judicial Court (Oct. 2, 2000).

> [T]he federal doctrine of res judicata, or claim preclusion, bars a subsequent action whenever three criteria are met: (1) there is a final judgment on the merits in an earlier action; (2) "sufficient identity" exists between the parties in an earlier action and later suits, and (3) "sufficient identity" exists between the causes of action in the two suits.

United States v. Cunan, 156 F.3d 110, 114 (1st Cir. 1998). "Maine, whose earlier judgment is invoked here as res judicata, employs [a functional "same transaction" test in determining whether the cause of action in the two cases is the same], which is therefore binding" in this court.

Diversified Foods, Inc. v. First National Bank of Boston, 985 F.2d 27, 30 (1st Cir. 1993).

> Under Maine law,
>
> [c]laim preclusion bars the relitigation of a claim if (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action. To determine whether the matters presented for decision in the instant action were or might have been litigated in the prior action, we examine whether the same cause of action was before the court in the prior case. We apply a transactional test to define a cause of action, pursuant to which the measure of the cause of action is the aggregate of connected operative facts that can be handled together conveniently for purposes of trial. A prior judgment bars a later suit arising out of the same aggregate of operative facts event[sic] though the second suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves evidence different from that evidence relevant to the first case.

Johnson v. Samson Constr. Corp., 704 A.2d 866, 868 (Me. 1997). (citations and internal punctuation omitted).

The plaintiff contends that this action is not barred by res judicata because he has named parties in addition to the town as the defendants in this action, unlike the state action; the dismissal of the state action did not constitute a judgment on the merits; and the current action includes claims not raised in the state action. Opposition at 6-13.

The defendants named by the plaintiff in this action and not named in the state court action are the inhabitants of the town of Sanford, the Sanford selectmen and William Roberts and Richard Wilkins in their individual capacities. Complaint at 1. Roberts is identified in the complaint as the

chairman of the town selectmen and Wilkins as "an official responsible for road maintenance within said town." Id. Paragraphs P5-P6. While Wilkins and the selectmen are not the same party as the town of Sanford(2), the only defendant in the prior action, the law considers them to be the town's privies for purposes of res judicata analysis. In the context of government entities, the Maine Law Court has discerned privity between town officials and a town. *Camps Newfound/Owatonna Corp. v. Town of Harrison*, 705 A.2d 1109, 1114 (Me. 1998). While Roberts and Wilkins are named in their individual capacities and might therefore at first glance appear to be unprotected by res judicata, id. (finding privity only where individual defendants sued in their official capacity), a review of the allegations in the complaint and the nature of the relief sought demonstrates that Roberts and Wilkins also come within the ambit of the doctrine. The complaint

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(2) The plaintiff argues that the town of Sanford and the inhabitants of the town of Sanford are separate parties. Plaintiff's Opposition at 9. Maine law is to the contrary. See, e.g. *Bureau of Taxation v. Town of Washburn*, 490 A.2d 1182, 1185 (Me. 1985).

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alleges no acts by the individual defendants that are separate and distinct from the acts alleged to have been undertaken by the other defendants, and certainly no acts by these individuals that were beyond the scope of their positions with or employment by the town. Indeed, the complaint alleges in each of its five counts that the actions at issue have been undertaken pursuant to municipal policy, Complaint at 5-9, providing no basis whatsoever for individual liability. The relief sought, as set forth in the complaint at page 61 and in the draft order submitted with the complaint, runs solely against the town; the complaint seeks no payment from the individual defendants in that capacity. Thus, the individuals

are in sufficient privity with the town to warrant a finding of identity of parties. Id.

Contrary to plaintiff's next argument, dismissal with prejudice of the state-court action does constitute a judgment on the merits. *Johnson*, 704 A.2d at 869.

With respect to the plaintiff's third an final argument, the complaint in the present action presents five counts, alleging federal constitutional violations, violation of 41[sic] USC 1985, violation of the Maine Civil Rights Act, violation of 17 M.R.S.A. 2701 et seq, and violation of 36 M.R.S.A. 652, Complaint at 5-9, all arising out of "the increasing use of extremely noisy hobby vehicles...upon an abandoned railbed," refusal of municipal authorities to abate the nuisance and "harassment, threatening, vandalism, and asault against: the plaintiff resulting from attempts to seek redress, id. At 2. The complaint in the state-court action, while not stated in counts, seeks relief almost identical to that sought in the present action. Compare Complaint, John S. Barth v. Town of Sanford, Maine Superior Court (York County), Docket No. CV-99-265, at 29-31 with [Proposed] Order granting relief in this case. The plaintiff characterizes only Counts II and III of the instant complaint as "present[ing] entirely new kinds of causes of action," and argues that res judicata may not apply to the other three counts because they present continuing torts, since "every instance of a nuisance is a new cause of action." Opposition at 8. Count II of the complaint alleges violation of the plaintiff's right to equal protection under the federal constitution and state law, and Count III alleges denial of his rights to equal protection and due process on the same legal basis. While it is true that the state-court complaint does not specifically allege violations of these rights, the res judicata inquiry does not stop there.

Under the transactional test applied by the Maine courts to determine whether the same cause of action was before the court in the prior action, "[a] prior judgment bars a later suit arising out [of] the same aggregate of operative

facts even though the second suit relies on a legal theory not advanced in the first case." *Johnson*, 704 A.2d at 868. That is precisely the situation presented here. The plaintiff's federal constitutional claims presented in counts II and III of the complaint arise out of the same aggregate of operative facts as did his claims in the state-court action. Comparison of the factual allegations in the two complaints makes this clear. The same is true of the plaintiff's claims under the Maine Human Rights Act. "A plaintiff may not split a cause of action and prosecute each of its parts in separate lawsuits." Id. "Res judicata prevents a litigant from splintering his or her claim and pursuing it in piecemeal fashion by asserting in a subsequent lawsuit other grounds for recovery for the same claim that the litigant had a reasonable opportunity to argue in the prior action" Id. At 868-69 (internal punctuation and citation omitted)(3).

The plaintiff contends that Counts I, IV and V allege a continuing nuisance and accordingly cannot be barred by res judicata "unless prior final judgment explicitly comprehended all future instances of such tort." Plaintiff's Opposition at 8. The complaint does allege that "[t]he nuisance

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(3) Each of the federal causes of action asserted in the complaint could have been brought in state court: claims under 42 USC 1985 (Complaint at 5-9), see, e.g., Holland v.Sebunya, 759 A.2d 205, 209, & n.6 (Me 2000; claims under 42 USC 1983 for taking of property without compensation and denial of equal protection (Complaint at 5-7, 9), see, e.g., Cottle Enters., Inc. v. Town of Farmington, 693 A.2d 330, 334-335 (Me. 1997); claims under 42 USC 1983 for denial of due process, see, e.g., Munjoy Sporting & Athletic Club v. Dow, 755 A.2d 531

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caused by operation of ATVs, motorcycles, and snowmobiles upon the subject railbed has continued with the same effects to the date of this complaint." Complaint paragraph 139. In

the context of the application of a statute of limitations, it is a general rule of Maine law that "[a]s long as the nuisance continues unabated, a plaintiff may bring successive actions for damages throughout its continuance." Murray v. Bath Iron Works Corp., 867 F.Supp. 33, 48 (D.Me. 1994). However, when the issue involves application of the doctrine of res judicata, a different focus is required. The plaintiff's argument would allow a plaintiff to bring successive claims of nuisance after repeated holdings by the courts that the activities at issue did not constitute a nuisance, merely because the activities continued unchanged after each such finding. A more obvious waste of judicial resources is difficult to imagine. Here, the state court's dismissal of the plaintiff's earlier complaint with prejudice operates, as a matter of law, as a judgment on the merits. The possibility that the dismissal resulted from a procedural violation rather than a determination that the claims actually lacked substantive merit, as the plaintiff suggests here, Opposition at 8-11, makes no difference., *Johnson*, 704 A.2d at 8699 n.1. Activity that has been found, per entry of judgment, not to constitute a nuisance as a matter of law cannot become a nuisance merely by virtue of the passage of time after such a determination has been made. See generally *Department of Human servs. V. Lowatchie*, 569 A.2d 197, 199-200 (me 1990) (dismissal with prejudice seven years previously of action seeking to establish paternity for want of prosecution bars second action seeking identical relief, applying res judicata; "res judicata forecloses the relotigation of the fact of paternity established in an earlier proceeding.").

Res judicata as that doctrine is interpreted and applied by the Maine Law Court bars this action.

III. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for certification of a class be DENIED and that the defendants' motion to dismiss this action be GRANTED.

(NOTICE omitted)

Dated this 5th day of November, 2001.

s/David M. Cohen
David M. Cohen
United States magistrate Judge

Appendix G: Order, U.S. District Court, CV-286-PC

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff and Representative of Class v. TOWN OF SANFORD, defendant	Civil No. 01-286-P-C

ORDER DISMISSING COMPLAINT

Before the court is defendant's Motion to Dismiss the Complaint (Docket No. 5). The motion and supporting memorandum (Docket No. 6) set forth several bases for dismissal of the Complaint. They make no mention of the fact that the Complaint fails to plead any facts showing that this court has any subject matter jurisdiction over whatever claims might be found to be stated in the Complaint.

The Court, however, has the responsibility to note sua sponte an absence of subject matter jurisdiction. After full review of the Complaint and the rest of the file contents, the Court FINDS that the Complaint herein fails to allege facts showing the existence of any subject matter jurisdiction of this Court over any of the putative claims contained therein.

Accordingly, it is hereby ORDERED that the Complaint herein be, and it is hereby DISMISSED without prejudice for lack of subject matter jurisdiction.

So ORDERED,
s/Gene Carter
GENE CARTER, District Judge

Dated at Portland, Maine this 15th day of December, 2000.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BARTH, Plaintiff	
v.	Civil No. 01-286-P-C
TOWN OF SANFORD defendant	Entered on Docket on 12/15/00

JUDGMENT

In accordance with Judge Gene Carter's Order Dismissing Complaint dated December 15, 2000, judgment of dismissal, without prejudice, is hereby entered in this matter.

WILLIAM S. BROWNELL
Clerk
By: s/Christa K. Berry
Christa K. Berry
Deputy Clerk

Dated December 15, 2000.

Appendix H: Decision & Order, Maine Law Court

MAINE SUPREME JUDICIAL COURT

JOHN S. BARTH

v.

TOWN OF SANFORD

Submitted on Briefs September 27, 2000

Decided October 2, 2000

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DADA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

MEMORANDUM OF DECISION

John S. Barth appeals from the Superior Court's (York County, Fritzsche, J.) dismissal of the complaint against the Town of Sanford alleging nuisance. Contrary to Berth's contentions, the Superior Court did not exceed the bounds of its discretion when it granted the town's motion to dismiss, *Orlandella v. O'Brien*, 637 A.2d 105, 106 (Me. 1994), nor did the Superior Court exceed the bounds of its discretion by denying Barth's motion for default judgment, *Solomon's Rock Trust v. Davis*, 675 A.2d 506, 509 (Me. 1996), or when it denied Barth's motion for recusal. *Johnson v. Amica Mutual Insurance Co.*, 1999 ME 106, paragraph 11, 733 A.2d 977, 980. Given that the Superior Court properly granted the town's motion to dismiss, all of Barth's remaining claims of error are moot.

The entry is:

Judgment affirmed.

Appendix I: Order, Maine Superior Court, CV-99-265

STATE OF MAINE	SUPERIOR COURT
YORK, ss.	Civil Action
	DOCKET No. CV-99-265
JOHN BARTH,	)
Plaintiff	)
v.	) ORDER
TOWN OF SANFORD,	)
defendant	)

After hearing and UPON CONSIDERATION of the same, the Court hereby GRANTS defendant Town of Sanford's Motion to Dismiss the above-entitled action with prejudice. No additional sanction beyond the dismissal with prejudice is ordered. Should an appeal be taken from this dismissal the filing fee for the appeal will be waived upon request of the plaintiff.

Dated: 3/30/00

s/Paul A. Fritzsche
Justice, Superior Court

[parts of the original are handwritten]

Appendix J: Order, Maine Superior Court, RE-99-067

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET No. RE-99-024
RE-99-067

SPRINGVALE NATURE TRAIL NEIGHBORHOOD ASSOCIATION, et al.,
Plaintiffs
v.
TOWN OF SANFORD,
Defendant

DECISION AND ORDER

In both cases the defendant Town of Sanford has filed a motion to dismiss or in the alternative to strike the amended complaints for failure to comply with the provision of Rule 8(a)(1), M.R.Civ.P., that requires that a complaint shall contain... "a short and plain statement of the claim showing that the pleader is entitled to relief." Likewise, Rule 8(e)(1) requires that "Each averment of a pleading shall be simple, concise, and direct."

In case RE-99-024 the plaintiffs filed a bound pamphlet of 71 pages for a complaint with an even more extensive booklet entitled "Exhibits attached to Complaint". The defendant filed a motion to strike the complaint and by order of July 8, 1999 this Court ordered that any amended complaint "...shall not exceed 30 pages in length, double spaced with a typeface of at least 12 point". The Court believed that those requirements were very generous to the plaintiff given Rule 8. An amended complaint was filed which was 29 pages single spaced along with a 30 page memorandum of law and a 7 page memorandum of supporting fact and observation.

In case RE-99-067 the plaintiff filed a document entitled amended complaint which was also 29 pages long single spaced with extensive exhibits, a 30 page memorandum

of law and a 7 page memorandum of supporting fact and observation. The two cases are essentially the same.

The issue is not whether it is possible for the defendant to read the amended complaints and respond. Obviously it is possible to do so. The issue is whether a defendant should be required to struggle with and plod through a complaint which is unnecessarily complex and lengthy in light of the clear directive in the Maine Rules of Civil Procedure. While these requirements of Rule 8 were initially designed in part to protect plaintiffs from objections that their complaints were not detailed enough or in the precise form require by the abolished common law pleading requirements, the provisions of Rule 8 were also designed to protect defendants by simplifying proceedings. As the 1970 text *Maine Civil Practice* by Field, McKusick and Wroth states at Page 195 "A verbose statement of the evidence relied upon is of course not short and plain."

The entries are:

> In RE-99-024 and Re-99-067 the defendant's motion to dismiss is granted. The amended complaints are dismissed without prejudice. All other pending motions are dismissed as moot.

Dated: October 26, 1999

s/Paul A. Fritzsche
Paul A. Fritzsche
Justice, Superior Court

Appendix K: Order, Maine Superior Court, RE-99-024

State of Maine

YORK, ss. SUPERIOR COURT
RE-99-024

Springvale Nature Trail
Neighborhood Association
and John S. Barth,
Plaintiffs

v.

Town of Sanford
defendant

ORDER

This cause came on for hearing, and was argued by counsel, upon the motions of the parties.

IT IS ORDERED that: (1) the defendant's motion to strike the complaint is granted. The plaintiffs will be given 30 days from the date of this order to amend the complaint. It shall not exceed 30 pages in length, double spaced with a typeface of at least 12 point.

(2) the defendant's motion to dismiss the plaintiff Springvale Nature Trail Neighborhood Association is granted

(3) the plaintiffs' motion for judgment is denied

It is also ordered that the new complaint shall be kept under seal by the Clerk until October 1, 1999 subject to any further order from any justice.

Dated: July 8, 1999

s/Paul A. Fritzsche
Justice Superior Court

Appendix L: Text of 28 U.S.C. § 2072

28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

[continuation omitted]

Text of 42 USC §1983

Civil Rights Act 42 USC § 1983:

> " § 1983. Civil Action for deprivation of rights
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." R.S. § 1979